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NO. 86-493

IN THE SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1986

TEXAS STATE COMMISSION FOR THE BLIND
AND THE STATE OF TEXAS

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For the Federal Circuit

BRIEF AMICI CURIAE FOR THE STATES OF CONNECTICUT, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, OKLAHOMA, SOUTH CAROLINA, VIRGINIA, AND WISCONSIN

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QUESTIONS PRESENTED

1) Can A Federal Agency Appeal A Decision Of An Arbitration Panel Properly Convened Pursuant To 20 U.S.C. §107d-2 When This Provision Provides That The Decision Of Such Panel Shall Be Final And Binding?

2) Even If A Federal Agency Has A Right To Appeal An Arbitration Award, Has The Department Of Defense Waived This Right By Failing To Take Any Action Until Suit To Enforce The Award Was Filed?

3) Can A Court Of Appeals Properly Overrule The Interpretation Placed Upon 20 U.S.C. §107d-3 ("The Military Exchange Exemption") By The Secretary Of Health, Education, And Welfare (Now Education) Since That Agency Was Designed By Congress To Oversee And Enforce 20 U.S.C. §107?

4) Whether The Exemption From Vending Machine Income Sharing Contained In The Randolph-Sheppard Act, 20 U.S.C. §107d-3(d), Applies to All Machines Under The Control Of The Military Exchanges Or Only To Vending Machines Within Retail Stores?

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INTEREST OF AMICI CURIAE[1]

The Randolph Sheppard Act, 20 U.S.C. §107-107f, (the Act) was passed in 1936 to provide the blind with renumerative employment and greater economic opportunities. It has been amended several times to effect this purpose, most recently in 1974. The 1974 amendments were directed in part toward vending facilities on federally-controlled property. 20 U.S.C. §107(b). The amendments established an income-sharing formula for vending machine income from non-blind vendors. A

1. This brief of *amici curiae* is filed pursuant to Rule 36.4 of the Rules of the Supreme Court. The *amici* states are listed in the Appendix to this brief.

blind vendor or state licensing agency would share one-hundred percent (100%) of the income from vending machines directly in competition with the blind vending facility, or a fifty percent (50%) or thirty percent (30%) share from vending machine income not in direct competition with the blind vending facility. §107d-3(b)(1). In addition, the 1974 Amendment had three exemptions from the income-sharing requirements. The first exemption, the "military exchange exemption," is at issue in this case.

The Department of Defense reads the exemption broadly enough to keep all vending machines operated by the blind off of military bases. Although the amount of money involved is less than one and a half percent (1½%) of the income available to military exchanges for recreational activities, it would make a tremendous difference to the shoestring budgets of blind vendors. It would allow the blind vendors to establish retirement benefits, pension programs, paid health insurance and sick leave. The Randolph-Sheppard Act was amended to provide these necessities to blind vendors even if it meant taking one penny from every dollar ear marked for the recreation activities of military personnel. Congress intended to help provide for the necessities of blind vendors, and the States involved in this brief are interested in ensuring that their visually disabled constituents are able to, some day, secure the benefits provided by Congress in 1974.

The issue of finality of the arbitration process provided in the Act is also of great concern, not only in this area but in many other administrative procedures. The Court of Appeals has held that Federal Agencies may appeal decisions under the Administrative Procedure Act although Congress has specifically restricted their appeal under the Act. The Court of Appeals also held that the Agency charged with administering the Randolph-Sheppard Act and holding the arbitration should be ignored upon appeal. If a final decision under the Administrative Procedures Act is not final, and federal trial courts reconsider all issues *de novo*, with no weight attributed to the administrative decision, then a significant body of litigation is transferred from the administrative area directly to the Federal District Courts. This is a result that is not authorized by the Administrative Procedure Act and if allowed to stand

will send reverberations that threaten to undermine the very foundation of administrative law in this country.

THE SCOPE OF THIS BRIEF

Although the Court of Appeals decision raises many issues, this "*amici*" brief is limited to the interpretation of the Military Exchange Exemption of the Randolph-Sheppard Act and the finality of an arbitration decision under that Act.

REASONS FOR GRANTING THE WRIT

The "amici" States urge this Court to review the Court of Appeals decision because the decision: (a) improperly denies important benefits to blind people, benefits that Congress attempted to provide over ten years ago; (b) conflicts with this Court's decisions relating to the finality of administrative decisions; and (c) conflicts with this Court's determination to limit the role of the Federal Courts to statutorily required litigation instead of expanding that role to duplicitous litigation of all administrative disputes.

I.

THE DECISION BELOW IMPROPERLY DENIES BLIND PEOPLE THOSE RIGHTS GRANTED BY THE RANDOLPH-SHEPPARD ACT.

Section 107d-3(d) of the Act provides as follows:

> **Income from vending machines in certain locations excepted**
>
> * * * *
>
> (d) Subsections (a) and (b)(1) of this section shall not apply to income from vending machines "*within retail sales outlets*" under the control of exchange or ships stores systems authorized by Title 10, or to income from vending machines operated by the Veterans Canteen Service, or to income from vending machines not in direct competition with a blind vending facility at individual locations, installations, or facilities on Federal property the total of which at such individual

> locations, installations, or facilities does not exceed $3,000 annually.

The Court of Appeals improperly deleted the italicized portion of the exemption in order to twist the language to meet its interpretation of the legislative history of the Randolph-Sheppard Act. The lower court did not want the income sharing provisions of the Act, subsections (a) and (b)(1), to apply to any vending machine owned by the military exchanges. Since Congress did not write this, the Court of Appeals rewrote the Act. The Court of Appeals decided from legislative history what Congress probably had in mind, but were presumably incapable of writing; even though Congress drafted the exact exempton sought by the lower Court in the very next line of the Act when referring to the Veterans Canteen Service. As Justice Jackson wrote:

> When we decide from legislative history, including statements of witnesses at hearings, what Congress probably had in mind, we must put ourselves in the place of a majority of Congressmen and act accordingly to the impression we think this history should have made on them ... that process seems to me to be not interpretation of a statute but creation of a statute.

U.S. v. Public Utilities Commission of California. 345 U.S. 295 (1953).

The brief of the Texas State Commission For the Blind and the State of Texas reviews the legislative history of the Act. It points out that the Department of Defense has had to be forced relunctantly into compliance with the purpose of the Act — that purpose being to:

> §107(a) ... provid[e] blind persons with renumerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting, blind persons licensed under the provisions of this chapter shall be authorized to operate vending facilities on any federal property.

The legislative history is replete with statements that the 1974 amendments were specifically designed to correct past abuses of the Department of Defense and to salvage a failing program. This is clear. What is ambiguous is the statements of various witnesses and congressmen as to their individual interpretation of the Act. The Court of Appeals chose to use ambiguous legislative history to rewrite unambiguous legislation. This is the opposite of what is done by most courts when they cautiously use unambiguous legislative history to clarify clearly ambiguous legislation.

The lower court appears to have done this because an award of money to the blind would have to come from the current recreation bank account for *essential* recreation activities—like softball games. The Court of Appeals could not imagine that Congress would endanger a few softball games to provide for blind vendors in their old age. However, the figures provided by the Department of Defense show that the Department of Defense would only have to cancel approximately one softball game per 100 games in order that the blind vendors can be fed and housed during their retirement years.

In 1978, the Exchange System machines distributed 120 million dollars to recreation activities.[2] By their estimates, income sharing would require 1.686 million dollars to be distributed to blind vendors for retirement and other benefits as required by Congress.[3] This is one point four percent (1.4%) of the yearly exchange budget for recreation. In comparison, this is one-tenth (1/10) of the money used from the recreation budget to subsidize bars in military clubs.[4] The Court of Appeals chose to rewrite the Randolph-Sheppard Act because it

2. J.A. p. 528, Testimony of General Umstead before Subcommittee on the Handicapped of the Committee of Labor and Human Resources United States Senate on Examination of the Implementation of the Randolph-Sheppard Act. April 30, 1979, p. 93.

3. J.A. p. 562, Explanatory paper presented to Subcommittee on the Handicapped of the Committee of Labor and Human Resources United States Senate on Examination of the Implementation of the Randolph-Sheppard Act. April 30, 1979.

4. J.A. p. 528. Testimony of General Umstead before Subcommittee on the Handicapped of the Committee of Labor and Human Resources United States Senate on Examination of the Implementation of the Randolph-Sheppard Act. April 30, 1979, p. 93.

could not imagine Congress burdening the recreation fund by one point four percent (1.4%) to care for blind vendors in their retirement, but the Court of Appeals had no problem with the proposition that fourteen percent (14%) of the fund be used to subsidize cheap liquor in military clubs. This concern over one point four percent (1.4%) of the recreation funds is not sufficient reason to rewrite the Randolph-Sheppard Act.

II.

THE DECISION BELOW IMPROPERLY EXPANDED THE CASE LOAD OF THE FEDERAL COURTS TO HAVE THEM RELITIGATE THOSE MATTERS WHICH CONGRESS HAD DIRECTED BE SETTLED ADMINISTRATIVELY.

This case now stands for two heretofore unknown propositions. The first proposition is that the words "final and binding" found in the Administrative Procedure Act and the Randolph-Sheppard Act mean not final and not binding. Once again, the words should mean what they say. The Department of Defense should not be able to appeal the decision of the arbitration panel either by direct appeal, or by collateral attack when the blind vendor comes with hat-in-hand to ask for the proceeds which he was due since 1975.

The second holding of the lower court is that the blind vendors, or the states as representatives, should not seek administrative redress of their grievances under the Randolph-Sheppard Act or perhaps other similar statutes, as the remedies provided are only designed to waste time before the grievance is properly brought before the appropriate federal court. Because the decision of the arbitration panel is neither final nor binding, and because the lower court completely ignored the interpretation placed on the Act by the old Department of H.E.W. and by the arbitration panel, it appears as though the lesson to be learned is that years of arbitration will only ensure that the blind vendor or the state will expend large amounts of money, time, and other resources. It appears as though the entire procedure is for naught. If that is the case, then thousands of more actions need to be filed directly into the federal courts so as to prevent the wasting of time in various administrative hearings.

III.
THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS CONCERNING THE DEFERENCE ACCORDED AN AGENCY'S INTERPRETATION OF A STATUTE WHICH THAT AGENCY IS CHARGED WITH ENFORCING.

Until the lower Court decided this issue, the various tribunals which had considered the issue previously thought the question was the reasonableness of the interpretation by H.E.W. of the military exchange exemption. The agency charged with administering the Randolph-Sheppard Act, H.E.W., decided that the Act said what it meant, and that the military should share its vending income unless the machines were in an exchange store. The Court of Claims also reasoned that it was not presented with evidence of unreasonable interpretation by H.E.W. or capricious action by either the old Department of H.E.W. or the arbitration panel. However, for the first time, the Court of Appeals decided not to defer to the agency with expertise in interpreting the Act, or the panel that heard the evidence. Instead the Court of Appeals deffered to a litigant with decades of documented abuse of the Act in determining how the Act applied to that particular litigant. The last paragraph of the lower court's holding explains that the Court of Appeals, unlike any other court of appeals, has held that the delinquent agency's interpretation must be upheld if it is reasonable, as opposed to this Court's holding that the interpretation that the agency charged with enforcing the statute against delinquents must be upheld unless it is unreasonable. The lower court's holding is directly opposite to this Court's holding in *United States v. Riverside Bayview Homes, Inc.*, 106 S.Ct. 4 (1986).

Assuming that the arbitration panel decision was appealable by the Department of Defense, and assuming that the Department of Defense did not waive their appeal, the APA provides that a reviewing court only set aside the arbitration panel's findings and conclusions found to be:

(a) arbitary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(b) contrary to constitutional right, power, privilege, or immunity;

(c) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(d) without observance of procedure required by law;

(e) unsupported by substantial evidence in a case subject to Sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(f) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

See Section 706 of the Administrative Procedure Act, 5 U.S.C. §706.

The Court of Appeals has ignored both the Administrative Procedure Act and this Court's holdings in determining how to judge the reasonableness of agency rules. Arguably, regulations of both the Department of Defense and the old Department of Health, Education and Welfare are not unreasonable. That is, both departments had what they considered good reasons for interpreting the law to require the regulations which they wrote. Since the law is that the agency charged with administrating the Act should be given deference in interpreting the Act, then the regulation propounded by the old H.E.W., being clearly reasonable, must stand. The Court of Appeals did not make the proper decision because it completely reversed the standards for review of an administrative decision.

CONCLUSION

The Court of Appeals decision improperly allows the Department of Defense to deny blind vendors money for their retirement that has been provided by the Randolph-Sheppard Act. The Court of Appeals decision also greatly expands the caseload of the federal courts by having them duplicate administrative hearings. Finally, the Court of Appeals decision concerning the deference accorded to agencies charged with interpreting

statutes is in direct conflict with this Court's decisions on that issue. Because this case is directly in conflict with this Court's holdings, and seeks to clog already crowded court dockets with duplicitious litigation, and literally aids the Department of Defense in stealing from the blind, this Court should grant the petition for certiorari of the Texas State Commission for the Blind and the State of Texas.

Respectfully submitted,

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APPENDIX

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